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December 11, 2020

Hon. Mayor Timothy L. Theaker  
City of Mansfield  
30 N. Diamond St.  
Mansfield, Ohio 44902

RE: Opinion on Increase in Compensation for Elected Officials  
Ordinance #19-240

Dear Mayor Theaker:

This Opinion letter has been prepared in response to your request for advice concerning whether Ordinance #19-240, passed by City Council on December 17, 2019, can or should be implemented. This Ordinance provides for salary increases for the Mayor, Director of Law, Director of Finance, President of Council, and members of City Council.

**BACKGROUND**

From the information provided to me and other information otherwise readily available, the facts surrounding the adoption of this Ordinance by City Council are as follows:

1. Ordinance #07-261, increasing the salaries of the Mayor, Director of Law, Director of Finance, President of Council and members of Council, was passed by the City Council on November 28, 2007 as an emergency ordinance that took effect on December 1, 2007. This was the date these elected officials began their new terms of office. This Ordinance provided for three (3) future stepped increases for these elected officials to take effect on December 1st of 2008, 2009 and 2010.

2. Ordinance #09-043, passed by City Council on March 3, 2009, amended Ordinance #07-261 to freeze the salaries for those same elected officials at the levels established in Ordinance #07-261 to be effective on December 1, 2008. This action was taken because the City had been, or was about to be, placed in fiscal watch. For example, the Mayor's salary under Ordinance #09-043 was \$81,568 per year as of December 1, 2008, and it was frozen at this level due to a forecasted deficit in the General Fund of over \$2,000,000. The salaries for the other listed public officials were also frozen at the December 1, 2008 levels effective for their respective positions in said Ordinance #09-043. Fiscal emergency for the City was declared on August 19, 2010.

3. Although the City was released from fiscal emergency on July 7, 2014, the salaries of these listed elected officials have remained unchanged since Ordinance #09-043 was passed. Again, for example, the Mayor's salary had remained at \$81,568 per year.

4. In September of 2019, the City's Human Resources Director wanted to have City Council adopt legislation to reinstitute salary changes for the listed elected officials. Those salaries had remained unchanged at the December 1, 2008 levels since passage of Ordinance #09-043.

5. Bill #19-247 was thereafter prepared to increase the salaries for these elected officials, was introduced at the City Council meeting held on November 19, 2019, was given a second reading at the meeting held on December 3, 2019, and was passed as Ordinance # 19-240 by City Council on December 17, 2019 by a vote of 5 to 3.

6. The elected officials listed in this Ordinance #19-240 when it was passed were then serving in their terms of office that were to expire on December 31, 2019, and their new/next terms of office were to commence on January 1, 2020.

7. Ordinance #19-240 was prepared as an emergency ordinance which would take effect as of January 1, 2020 if passed by a two-thirds (2/3) affirmative vote by City Council. However, since the vote passing this Ordinance was only 5 to 3, it was to take effect as a non-emergency ordinance thirty (30) days after its passage, that being January 16, 2020.

8. Due to some concerns about the validity of this Ordinance under the circumstances surrounding its preparation and adoption, the City has not implemented its provisions nor paid any of the salary increases established for the elected officials named therein.

## **ISSUE**

The question being addressed in this Opinion is whether the City can implement the provisions of Ordinance #19-240 increasing the salaries of the Mayor, Director of Law, Director of Finance, President of Council and Council members without incurring any adverse legal consequences. The following Legal Analysis will examine the authority of the City to adopt such salary increases under laws applicable to municipalities, followed by an examination of the impact of the Ohio Ethics statutes.

## **LEGAL ANALYSIS**

### **Local Self-Government**

R.C. 731.07 provides in relevant part that "The salary of any officer of the city shall not be increased or diminished during the term for which he has been elected or appointed." (Emphasis added.) There is a more restrictive provision pertaining to the compensation of elected village

officers in R.C. 731.13. That statute provides in relevant part as follows: "The legislative authority shall, in the case of elective officers, fix their compensation for the ensuing term of office at a meeting held not later than five days prior to the last day fixed for filing as a candidate for such office." (Emphasis added.) This latter statute clearly prohibits any increase in compensation for elective village officers during their current term of office as it appears to require the compensation be fixed well before the next term would begin and much earlier than R.C. 731.07 requires for city elected officers.

In the Village of Bellville, Ohio, the terms of office for certain Village Council members began on January 1, 1974. After that date, the Village Council passed Ordinance No. 19-74, which increased the compensation for those Council members during their current terms of office, and they were paid that increased compensation. The Auditor of State made a finding for recovery against those Council members for the increased compensation amount as a prohibited increase in violation of R.C. 731.13. This finding resulted in the Ohio Attorney General bringing an action to recover said funds, which case is known as *Village of Bellville v. Beal*, No. CA-2062 (Ct. App. Richland Co. 1982), 7 Ohio App. 3d 291, 455 N.E.2d 683. Therein, the Fifth District Court of Appeals (which District includes Richland County) examined R.C. 731.13 and Ohio Constitution Article XVIII, Sections 2 and 3. Section 2 thereof states in relevant part as follows: "General laws shall be passed to provide for the incorporation and government of cities and villages, . . ." Section 3 thereof states as follows: "Municipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with the general laws." (Emphasis added.)

The Fifth District Court of Appeals relied on *Northern Ohio Patrolmen's Benevolent Assn. v. Parma* (1980), 61 Ohio St.2d 375, 402 N.E.2d 519, wherein the Ohio Supreme Court, upon analyzing prior cases involving these Constitutional provisions, stated generally that said Section 2 limits the control of the Ohio General Assembly to matters of organization and procedure of the municipal government, meaning that non-chartered municipalities must adhere to the state statutes in "procedural matters". Further, the Ohio Supreme Court stated that pursuant to said Section 3 a non-chartered municipality may enact an ordinance which is at variance with state statutes in matters of "substantive" local self-government.

Based upon these rulings by the Ohio Supreme Court, the Fifth District Court of Appeals determined that said Section 2 permits the General Assembly through state statutes to control procedures of a non-chartered municipality, such as how to proceed to "enact" an ordinance, but that said Section 3 prohibits the General Assembly from prescribing rules for the conduct of human beings contained in ordinances as being substantive self-government matters. As applies to the current situation, the fixing of salaries or compensation is a matter within the constitutional powers of local self-government, free from the control of the Ohio General Assembly. *City of Mansfield v. Endly* (1931), 38 Ohio App. 528, 176 N.E. 462 (5<sup>th</sup> Dist. Richland County 1931), affirmed 124 Ohio St. 652, 181 N.E. 886. As a result, the Court of Appeals held that, despite the R.C. 731.13 restriction, the Council of the Village of Bellville, as a non-chartered municipality, had the power to mandate by ordinance an increase in the compensation paid to members of the Council during

their terms of office pursuant to its powers of local self-government under Article XVIII, Section 3 of the Ohio Constitution.

Thereafter, following the reasoning in the *Parma* and *Village of Bellville* cases, the Ohio Attorney General in 83 Ohio Op. Atty. Gen. 83-036, dated July 22, 1983, opined on page 3 thereof as follows: "Therefore, even though R.C. 731.07 prohibits a city from granting in-term increases in compensation to its officers, a city may, pursuant to Ohio Constitution Article XVII, Section 3, and regardless of whether it has adopted a charter, pass an ordinance which is at variance with R.C. 731.07." (Emphasis added.) However, it should be noted that Eleventh District Court of Appeals in *Creed v. City of Hubbard*, No. 91-T-4509 (Ct. App. Trumbull Co. 1992), 78 Ohio App.3d 461, 605 N.E.2d 415, held that R.C. 731.07 prohibiting in-term pay increases for city officials precluded a non-charter municipality from granting the mayor an in-term pay increase. This Eleventh District Court of Appeal also relied upon the *Parma* case, but without citing to any precedents, determined that the time for that pay increase was not substantive, but was procedural and was thus controlled by R.C. 713.07.

With this background in mind, the pay increases contained in Ordinance #19-240 are valid for three (3) reasons. First, the *Village of Bellville* case is controlling in this instance since this decision is by the Fifth District Court of Appeals, and the City of Mansfield is located within the jurisdiction of that Court, and thus, R.C. 731.07 is not applicable. Second, these pay increases are not actually in-term pay increases, but are pre-term pay increases since this Ordinance was enacted on December 17, 2019, which was prior to the commencement of the new terms of office beginning on January 1, 2020. Even if R.C. 731.07 applied here, that statute prohibits salary increases "during the term for which he has been elected," which applies only to in-term increases. Third, unlike the cases cited herein involving non-chartered, statutory municipalities, the City of Mansfield operates under its Charter which became effective on January 1, 1983. Most notably, Article II, Section 2.02 of the Charter states as follow: "All powers shall be exercised in the manner prescribed in this Charter, or if not so prescribed, in the manner provided by ordinance or resolution of Council. When not prescribed in this Charter or by ordinance or resolution, then the powers shall be exercised in the manner provided by the laws of Ohio until Council provides a different manner of exercising the powers." Also, the powers of the City under its Charter are to be liberally construed in favor of the City. Charter, Article III, Section 2.03.

Therefore, based upon the foregoing analysis, this Opinion finds that under the Constitution, the laws of the State of Ohio and the Mansfield Charter, Ordinance #19-240 granting salary increases to the Mayor, Director of Law, Director of Finance, President of Council and the Council members, effective as of January 16, 2020 is valid.

#### Ohio Ethics Statutes

R.C. Chapter 102 contains two (2) provisions which prohibit certain acts by public officials and employees that should be examined to determine if the adoption and implementation of

Ordinance #19-240 might result in ethics violations. These provisions are Paragraphs (D) and (E) of R.C. 102.03, and they read as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial or improper influence upon him with respect to his duties.

(Emphasis added.) Using these statutory provisions as authority, the Ohio Ethics Commission has issued two (2) lengthy formal OEC Advisory Opinions, namely Numbers 91-007 and 91-008 which were both issued on December 5, 1991, and they examine the impact of those provisions on salary increases for various city officials, regardless of whether the city had a charter or was a statutory city. Later, on April 2, 1993, the Ethics Commission issued its OEC Advisory Opinion No. 93-006, which similarly examined compensation increases for village officials.

Rather than engaging in a detailed examination of those OEC Advisory Opinions, this Opinion will only provide a summary of its determinations as described in Informal Opinion 1996-INF-202-1 approved by the Ethics Commission on February 2, 1996. The reason for this summary examination will hereinafter become obvious below, but it is presented primarily to give a historical perspective to the Commission's interpretation of such laws. Generally, those three (3) OEC Advisory Opinions state that (1) R.C. 102.03(D) prohibits all public officials, regardless of their duties and authority, from misusing the authority and influence of their public positions in any way to secure an in-term increase in their compensation, and (2) R.C. 102.03 (E) prohibits a municipal official with discretionary authority to introduce or participate in the enactment of legislation, the appropriation of municipal funds, or the establishment of compensation for his public position from accepting an in-term increase in compensation, regardless of whether he participated in the enactment of the ordinance or otherwise used his authority to secure the increase.

Based on such interpretations, the Ohio Ethics Commission held in Informal Opinion 1996-INF-202-1 that those two statutory provisions "prohibit city and village council members, city presidents of council, city and village mayors, city law directors, and village solicitors from participating in the enactment of, and accepting, in-term increases of their own pay." (Emphasis added.) However, it should be noted that OEC Advisory Opinions Nos. 91-007 and 91-008 found that certain municipal officials did not violate those statutory prohibitions apparently because they usually do not exercise discretionary authority with respect to the enactment of legislation, the appropriation of municipal funds, or the establishment of compensation for their respective positions. Those excluded positions are a clerk of city council, city auditor, a city treasurer and a city director of public safety. The Ohio Ethics Commission also stated that these prohibitions applied regardless of whether the municipality was a statutory city or operated under a city charter.

In addition, Informal Opinion 1996-INF-0202-1 also stated that the Ohio Ethics Commission has also held that R.C. 102.03 (D) and (E) prohibit “an individual who has been re-elected to public office from accepting an increase in his compensation that is enacted after his re-election, but prior to the beginning of his new term of office.” (Emphasis added.) By contrast, the Commission further stated that applicable laws do not prohibit “an elected municipal official from receiving an increase in compensation at the commencement of a new term if he participated in discussions or voted for the increase during his previous term prior to his re-election.” This determination seems to give approval to what may be viewed as a “pre-term” enactment of a pay raise occurring prior to the election that will be received in the next succeeding term of office, as opposed to an “in-term” increase in compensation, which can typically be described as the enactment of a pay raise that will be received during the same term of office as when that legislation is passed.

Moving forward in time, on December 18, 1995, the City of Canton, a non-charter city, enacted Ordinance No. 254/96 which granted a nine percent pay raise to the mayor, law director, auditor, president of council and council members. That raise was to take effect on January 1, 1996 when the new terms for those officers commenced. The Law Director had previously determined that no statute, opinion or other precedent prohibited such post-election, pre-term pay raises. As a result of an inquiry to the Ohio Ethics Commission by two taxpayers, the Law Directors of Canton and Massillon requested an advisory opinion from the Ohio Ethics Commission. The Commission thereafter issued its Advisory Opinion No. 96-001, dated March 15, 1996. Since the above facts that occurred in Canton similarly mirror those surrounding the adopting and implementation of Ordinance #19-240, the entire syllabus of that Advisory Opinion reads as follows:

(1) Division (D) of Section 102.03 of the Revised Code prohibits all municipal officers of a statutory city or village, including the mayor, law director, president of council, and council members, from authorizing or using the authority or influence of their office, formally or informally, to enact an ordinance that will increase compensation to which they are entitled in the next term of office, after knowing that they have been reelected to the office, but prior to the beginning of their new term.

(2) Division (E) of Section 102.03 of the Revised Code prohibits all municipal officers of a statutory city or village, including a mayor, law director, president of council, and council members, from accepting an increase in compensation to which they are entitled in their next term of office, after knowing that they have been reelected to the office, but prior to the beginning of their new term.

(3) Because the Ohio Ethics Law and related statutes establish a uniform standard of ethical conduct for all persons who serve as public officials, these statutes apply equally to an incumbent public official, who at the time is also an unchallenged candidate for office.

(Emphasis added.) These broad prohibitions seem to have the effect of (1) prohibiting an incumbent elective office holder who will be serving in the same position in the next succeeding term of office from participating in the enactment of pre-term pay raise, regardless of whether that incumbent has already been elected to serve in the next term of office or will so serve because that person is an unchallenged candidate for such office, and (2) prohibiting that elective office holder from accepting that pay raise.

In response to this OEC Advisory Opinion No. 96-001, certain members of the Canton City Council filed a complaint for a declaratory judgment seeking an order declaring their Ordinance No. 254/96 is valid. Following a decision favorable to the plaintiffs, an appeal was taken to the Court of Appeals. In *Coleman v. City of Canton*, Case No. 1997-CA-00303 (Ct. App. Stark Co. 1998), 1998 WL 401026, appeal not allowed 83 Ohio St.3d 1436 (1998), the Fifth District Court of Appeals examined R.C. 102.03 (D) and (E) and determined that the concerns covered by those statutory provisions, and claimed to have been violated, do not refer to the facts surrounding the Canton Ordinance and that R.C. 102.03 did not apply. In reaching that result, the Court stated as follows:

“There are no allegations, in this case, that the pay raise would be a substantial and improper influence with respect to the performance of their duties as city council members. The language of the statute refers to actions that result in personal gain to the council member by the act of accepting a gift or something of value that may affect or influence the council members’ votes or action for the benefit of the donor rather than the general good of the residents of the city.”

(Emphasis added.) As applies to the situation under examination here, Ordinance #19-240 was passed on December 17, 2019 and should have taken effect on January 16, 2020. These facts shown that rather than an “in-term” increase in compensation, the issue here involves a “pre-term” increase which was passed post-election. As such, implementation of Ordinance #19-240 would appear to constitute a violation of Section 102.03(D) and (E) under OEC Advisory Opinion No. 96-001. However, the facts in the *Coleman* case pertaining to the enactment and effective date of the Canton pay increase ordinance are nearly identical to the enactment and effective date of Ordinance #19-240 in question here, and the decision in that case supports the claim that said Ordinance #19-240 is valid and its implementation should not result in any violations of R.C. 102.03(D) and (E).

Therefore, based upon (1) the similarity of the facts in the *Coleman* case to those which exist here, that being a pre-term enactment of salary increases for elective officers taking effect post-election and in a new term, (2) that this *Coleman* decision is controlling within the limits of the Fifth District Court of Appeals, including the City of Mansfield, and (3) that a further request to appeal that decision to the Ohio Supreme Court was disallowed, the action taken by the City of Mansfield enacting and implementing its Ordinance #19-0240 does not violate the Ohio Ethics Laws.

## CONCLUSION

Based upon the facts presented herein and the foregoing analysis of the application and interpretation of relevant state law, it is my opinion that Ordinance #19-240 granting salary increases to the Mayor, Director of Law, Director of Finance, President of Council and Council members is valid under the City's powers of local self-government, is not prohibited by R.C. 102.03(D) and (E), and may be implemented.

Respectfully,

A handwritten signature in cursive script that reads "Reese F. Mills".

Reese F. Mills